

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MASON JAMES HENRY,)	
)	
Defendant/Movant,)	CR 08-01377 PHX JAT
)	CIV 10-02776 PHX JAT (MEA)
v.)	
)	REPORT AND RECOMMENDATION
UNITED STATES OF AMERICA)	
)	
Plaintiff/Respondent)	
)	

TO THE HONORABLE JAMES A. TEILBORG:

Mr. Mason Henry ("Movant"), proceeding pro se, filed a Motion to Vacate, Set Aside or Correct Sentence, pursuant to 28 U.S.C. § 2255, regarding a criminal conviction and sentence entered by the Court on December 23, 2010. Respondent filed a Response to Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 on April 20, 2011. See Doc. 12. Petitioner filed a reply to the response on May 24, 2011. See Doc. 13 & Doc. 14.

I Procedural History

A grand jury indictment returned November 19, 2008, charged Movant and co-defendant Melvin Nash with the first-degree premeditated murder of Aaron Tierno (Count 1). The indictment also charged Movant with three counts of brandishing and discharge of a firearm during a crime of violence resulting in death (Counts 2, 4, and 6).

1 The indictment also charged Movant with first-degree
2 felony murder, i.e., that the murder occurred during a robbery
3 (Count 3); one count of robbery, including robbing the victim of
4 his vehicle (Count 5); and one count of conspiracy (Count 7).
5 On November 21, 2008, Movant was arrested and counsel was
6 appointed to represent Movant. On January 22, 2009, Movant's
7 motion to change counsel was granted and new counsel was
8 appointed to represent Movant.

9 On May 29, 2009, Movant's counsel filed a motion to
10 sever his trial from that of his co-defendant. See Criminal
11 Doc. 47. Movant argued, *inter alia*, that the evidence against
12 his co-defendant greatly out-weighed the evidence against Movant
13 and that Movant's co-defendant had or would make statements
14 inculcating Movant. On July 23, 2009, finding that Movant
15 intended to raise a defense antagonistic to his co-defendant,
16 i.e., that the co-defendant acted alone, the Court granted
17 Movant's motion to sever his trial from that of his co-
18 defendant. See Criminal Doc. 67.

19 On August 4, 2009, the Court noted that Movant's co-
20 defendant had entered a guilty plea and affirmed a trial date
21 regarding Movant. On August 5, 2009, Movant entered a guilty
22 plea to one count of second-degree murder, as a lesser-included
23 offense of Count 1 of the indictment. See Criminal Doc. 74.
24 Movant also signed a written plea agreement on August 5, 2009.
25 The terms of the written plea agreement included a stipulation,
26 pursuant to Rule 11(c)(1)(C), Federal Rules of Criminal
27 Procedure, that Movant be imprisoned for a term not exceeding 25
28 years and not less than 15 years. See Criminal Doc. 109. The

1 remaining counts of the indictment were to be dismissed at
2 sentencing. The plea agreement also included a waiver of
3 Movant's right to appeal and his right to collaterally attack
4 his conviction and sentence pursuant to section 2255, providing
5 Movant's sentence was consistent with the terms of the plea
6 agreement.

7 During the plea colloquy, the Court verified with
8 Movant, under oath, that he was competent to enter the guilty
9 plea and was satisfied with his attorney:

10 THE COURT: How far have you gone in school?

11 THE Movant: About to the eleventh grade.

12 THE COURT: Now, from what I can determine so
13 far, you seem to speak and understand the
14 spoken English, but do you also read, write
15 and understand the written English?

16 THE Movant: Yes.

17 THE COURT: Have you had any drugs, alcohol,
18 or medicine in the last 48 hours?

19 THE Movant: No.

20 THE COURT: Have you recently been treated for
21 any mental illness or addiction to substance
22 of any kind?

23 THE Movant: No

24 THE COURT: And, Mr. Simon, is there anything
25 in the government's file or information the
26 government has learned through its
27 investigation of the Movant that would
28 indicate the Movant is not competent to
understand this proceeding or enter into this
plea agreement?

MR. SIMON: No, Your Honor.

THE COURT: And, Mr. Raynak, anything you've
learned during your investigation of this
case or through your contacts with your
client that would lead you to believe that
your client is not competent to enter into
this plea?

MR. RAYNAK: No, Judge. I would note that was
one of my concerns when I first met him. It
takes a little longer sometimes for Mason to
process things, but he did go at least
through the eleventh grade and he was never
in any special education classes. And while
he seems to be a little slower in responding
to me, he does seem to understand once I
explain it to him. I sometimes have to go

1 over it twice perhaps, but he does understand
2 the general nature of the proceedings and
3 what is going on. I'm just letting the Court
4 know I did -- because of my initial contact
5 with him, I did look at that a little more
6 closely.

7 THE COURT: And he has been able, in your
8 judgment, to adequately assist you in the
9 preparation of his case; is that correct?

10 MR. RAYNAK: Yes, sir.

11 THE COURT: Have you been satisfied with your
12 lawyer in this case?

13 Movant: Yeah.

14 Criminal Doc. 103 at 4-6.

15 When reviewing the rights Movant was giving-up by
16 entering his guilty plea the Court specifically referred to the
17 paragraph of the plea agreement titled "Waiver of Defenses and
18 Appeal Rights", stating:

19 THE COURT: And in term of rights you are
20 giving up, let me call your attention to the
21 written plea agreement and we will go over it
22 in more detail in a moment, but in this
23 written plea agreement there's a paragraph
24 that is titled Waiver of Defenses and Appeal
25 Rights. And that waiver in detail specifies
26 that you are waiving or giving up any and all
27 motions or defenses or probable cause
28 determinations or objections which you could
assert to the indictment or the court's entry
of judgment against you or imposition of
sentence upon you as long as the sentence is
consistent with this agreement.

And furthermore, you are waiving and giving
up the right to appeal the judgment and
sentence imposed on you and you're giving up
the right to later collaterally attack your
conviction and sentence under 28 U.S.C.
Section 2255, or any other collateral attack
where you might later attack or challenge
your conviction and sentence.

So, do you understand that by signing this
plea agreement, you're giving up those
defenses and appeal rights that are set forth
in the plea agreement?

THE Movant: Yes.

THE COURT: Now then, I have gone over all
these rights with you that you have. Do you
still wish to give up those rights and enter
a guilty plea? Is that still your wish?

1 THE Movant: Yes.

2 Id. at 7-8.

3 The Court also verified that Movant had read and
4 understood the contents of the plea agreement, ensuring that his
5 guilty plea was knowing and voluntary. The Court thereafter
6 reviewed with Movant the remaining provisions of the plea
7 agreement, including the Rule 11(c)(1)(C) sentencing
8 stipulation:

9 THE COURT: Now, this -- one of the provisions
10 in this plea agreement is ... is an agreement
11 between you and the government that you will
12 be imprisoned for a term not to exceed 25
13 years, but not less than 15 years, and with
14 the decision within that range as to exactly
15 what the sentence will be to be left to the
16 discretion of the court. Do you understand
17 that's the way it works?
18 THE Movant: Yes.

19 Id. at 16.

20 At the close of the plea colloquy, the Court
21 specifically inquired about Movant's decision to plead guilty:

22 THE COURT: All right. Sir, the charge then is
23 a lesser included offense of Count 1, and
24 that is Second Degree Murder, Aiding and
25 Abetting, in violation of Title 18, United
26 States Code, Sections 1153 and 111, a Class
27 A felony offense. Do you plead guilty or not
28 guilty?
29 THE Movant: Guilty.
30 THE COURT: And are you pleading guilty to
31 this crime because you are guilty?
32 THE Movant: Yes.

33 Id. at 21.

34 The Court accepted and entered Movant's guilty plea and
35 set sentencing for November 2, 2009. On September 28, 2009, the
36 Presentence Report was completed. The report included
37 recommendations for a four-level upward departure from the

1 otherwise applicable United States Sentencing Guideline
2 ("U.S.S.G.") sentencing range, pursuant to U.S.S.G. § 5K2.21,
3 based on the seriousness and random nature of the offense. See
4 Civil Doc. 12 at 8. The PSR recommended that Movant be
5 sentenced to a term of imprisonment of 25 years, the high end of
6 the Rule 11(c)(1)(C) stipulated sentencing range provided in the
7 plea agreement. Id.

8 On October 9, 2009, Movant filed a motion seeking to
9 change counsel, essentially alleging that Movant's counsel "was
10 misleading ... ineffective and coercive by making false
11 statements-false promises and coaching Movant ... making the
12 Movant believe he had no option but to enter into the plea."
13 Criminal Doc. 82. At that time Movant's then-counsel filed a
14 motion seeking to continue Movant's sentencing and stating that
15 Movant's motion to change counsel indicated Movant "might" wish
16 to withdraw from the plea agreement. See Criminal Doc. 80.

17 On October 15, 2009, during the ensuing hearing on
18 Movant's motion to change counsel, the Court reminded Movant of
19 his statements made during the plea colloquy, under oath, which
20 directly contradicted the allegations in Movant's motion. See
21 Criminal Doc. 84. Movant's counsel, while limited by
22 attorney-client privilege, nonetheless represented to the Court
23 that he disagreed with and denied Movant's allegations. See id.
24 The Court, noting that Movant's allegations were "totally
25 inconsistent with anything you [defense counsel] have done in
26 this court or, to my knowledge, any other court, or with your
27 reputation", nonetheless granted Movant's motion. See Criminal
28 Doc. 84.

1 On October 19, 2009, new counsel was appointed to
2 represent Movant. See Criminal Doc. 85. On December 14, 2009,
3 Movant's new counsel filed a sentencing memorandum which
4 included a request that the Court impose a sentence of
5 imprisonment of 15 years, that is, the minimum sentence
6 available under the Rule 11(c)(1)(C) plea agreement stipulation.
7 See Criminal Doc. 102 & Criminal Doc. 119. Movant did not at
8 any time file a motion, pro se or otherwise, to withdraw from
9 the plea agreement.

10 On December 22, 2009, during the sentencing proceeding,
11 the Court verified that Movant had reviewed the pre-sentence
12 report. The Court, after providing Movant's attorney and Movant
13 with the opportunity to address the Court regarding sentencing,
14 verified that Movant was satisfied with his attorney: "THE
15 COURT: And you've been satisfied with your lawyer? THE Movant:
16 Yes." Criminal Doc. 121 at 5.

17 Movant was sentenced to a term of 25 years
18 imprisonment, to be followed by 36 months of supervised release.
19 The Court also verified Movant was aware that, because the
20 sentence imposed was consistent with the terms of Movant's plea
21 agreement, Movant had waived his right to appeal.

22 THE COURT: ... Now sir, in the plea agreement
23 that you signed, at page 4 is a paragraph
24 where you agreed to waive your right to
appeal. Do you remember that paragraph in the
plea agreement?

25 THE Movant: Yes, sir.

26 THE COURT: And you signed that plea agreement
voluntarily, understanding that by
27 signing it you were waiving your right to
appeal. Is that correct?

28 THE Movant: Yes, sir

 THE COURT: The Court finds Movant has
knowingly and voluntarily waived his right to

1 appeal.

2 Id. at 38-39.

3 Movant did not take a direct appeal of his conviction
4 and sentence.

5 In his section 2255 petition, Movant asserts that his
6 attorney factually misrepresented to the Court that Movant was
7 guilty of second-degree murder. The record establishes,
8 however, that in the written plea agreement and during his
9 guilty plea colloquy Movant voluntarily acknowledged as accurate
10 the facts that established his guilt. Movant also admitted to
11 the Court that he, Movant, was pleading guilty to the charge of
12 second-degree murder because he was guilty of that crime.

13 Movant also contends that he was induced into pleading
14 guilty by his counsel's misrepresentation that Movant's sentence
15 would fall within the guideline range of 168 to 210 months. The
16 record establishes, however, that in the written plea agreement
17 and during his guilty plea colloquy Movant specifically
18 acknowledged and understood that the plea agreement provided he
19 would be imprisoned for a term not exceeding 25 years and not
20 less than 15 years.

21 Movant also maintains his counsel's performance was
22 unconstitutionally ineffective because Movant was incompetent to
23 enter a guilty plea. Movant further asserts that "in the realm
24 of possibilities" his counsel may have been pressured by the
25 government to induce Movant to enter a guilty plea because this
26 would prevent information regarding victim Aaron Tierno's
27 "possession of child pornography" from becoming public.

28

Waiver of the right to a collateral attack

Respondent asserts that Movant waived his right to collaterally attack his conviction and sentence pursuant to section 2255 in the written plea agreement. The plea agreement signed by Movant expressly waived his right to collaterally attack any matter pertaining to Movant's conviction and sentence if the sentence imposed was consistent with the written terms of the agreement. The sentence imposed on Movant was consistent with the terms of the plea agreement, i.e., the plea agreement stated Movant's sentence would be between 15 and 25 years and he was sentenced to a term of 25 years imprisonment. Because the sentence imposed was in accordance with the plea agreement, the plea agreement is valid. Therefore, Movant is bound by the plea agreement's waiver of his right to collaterally attack his conviction and sentence.

Because Movant legitimately waived his right to bring this action, his section 2255 motion may be summarily denied. See Mabry v. Johnson, 467 U.S. 504, 508-09, 104 S. Ct. 2543, 2546-47 (1984) ("It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked."); United States v. Jeronimo, 398 F.3d 1149, 1157 (9th Cir. 2005) (reaching this conclusion in the context of a direct appeal wherein the Movant waived his right to directly appeal or collaterally attack his conviction and sentence in a plea agreement); United States v. Bolinger, 940 F.2d 478, 480-81 (9th Cir. 1991).

1 However, a plea agreement which waives the Movant's
2 right to collaterally attack their sentence is not enforceable
3 if the waiver was involuntary. See, e.g., Jeronimo, 398 F.3d at
4 1156. In Jeronimo the Ninth Circuit Court of Appeals concluded
5 that the District Court did not have jurisdiction to consider
6 the appeal of a Movant who had waived his right to collaterally
7 attack his conviction in a plea agreement because the agreement
8 was knowing and voluntary on its face, stating: "A defendant's
9 waiver of his appellate rights is enforceable if (1) the
10 language of the waiver encompasses his right to appeal on the
11 grounds raised, and (2) the waiver is knowingly and voluntarily
12 made". Id. See also United States v. White, 307 F.3d 336, 343
13 (5th Cir. 2002).

14 A collateral attack alleging ineffective assistance of
15 counsel in negotiating a plea agreement may be brought
16 notwithstanding a waiver of this right in the agreement, but
17 only if the agreement was involuntary or unknowing, or if the
18 court relied on an impermissible factor such as race, or where
19 the agreement is otherwise unlawful. See United States v.
20 Cockerham, 237 F.3d 1179, 1182 (10th Cir. 2001); Bridgeman v.
21 United States, 229 F.3d 589, 591 (7th Cir. 2000).

22 Movant's contemporaneous statements regarding his
23 understanding of the plea agreement carry substantial weight in
24 determining if his entry of a guilty plea was knowing and
25 voluntary. Cf. United States v. Mims, 928 F.2d 310, 313 (9th
26 Cir. 1991) (reaching this holding in a section 2255 case);
27 United States v. Walker, 160 F.3d 1078, 1096 (6th Cir. 1998)
28 (holding, in a section 2255 case, that "a straightforward and

1 simple 'Yes, your Honor' is sufficient to bind a Movant to [the]
 2 consequences [of a plea agreement]."). Because he was
 3 adequately informed of the consequences of his plea, Movant's
 4 guilty plea can be considered voluntary and knowing. See Boykin
 5 v. Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 1712 (1969).
 6 The undersigned concludes Movant's guilty plea was voluntary and
 7 made intelligently. See Chizen v. Hunter, 809 F.2d 560, 562
 8 (9th Cir. 1986); United States v. Kamer, 781 F.2d 1380, 1383
 9 (9th Cir. 1986).

10 Because Movant does not produce any evidence indicating
 11 he did not knowingly and voluntarily enter into the agreement,
 12 other than his own self-serving statement, the undersigned
 13 concludes the plea agreement was valid, as was Movant's
 14 voluntary waiver of his right to collaterally attack his
 15 sentence. Accordingly, the section 2255 petition should be
 16 denied and dismissed. Compare United States v. Pruitt, 32 F.3d
 17 431, 433 (9th Cir. 1994) ("we doubt that a plea agreement could
 18 waive a claim of ineffective of assistance of counsel based on
 19 counsel's erroneously unprofessional inducement of the defendant
 20 to plead guilty or accept a particular plea bargain.").

21 **Movant's ineffective assistance of counsel claims**

22 The Sixth Amendment guarantees criminal
 23 defendants the right to effective assistance
 24 of counsel. Strickland v. Washington, 466
 25 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674
 26 (1984).... To prevail on a claim of
 27 ineffective assistance of counsel, petitioner
 28 must show 1) his attorney's performance was
 unreasonable under prevailing professional
 standards; and 2) there is a reasonable
 probability that but for counsel's
 unprofessional errors, the results would have
 been different. United States v. Blaylock,
 20 F.3d 1458, 1465 (9th Cir. 1994) (quoting

1 Strickland, 466 U.S. at 687, 104 S. Ct. at
2 2064). "Strickland defines a reasonable
3 probability as 'a probability sufficient to
 undermine confidence in the outcome.'" Id.

4 United States v. Span, 75 F.3d 1383, 1386-87 (9th Cir. 1996).

5 In order to find that Movant was deprived of the
6 effective assistance of counsel and grant him habeas relief, the
7 Court must conclude counsel's performance was incompetent and
8 that his deficient trial performance prejudiced Movant.

9 [N]ot every case of deficient performance
10 under Strickland represents a constructive
11 denial of the right to counsel. In fact, it
12 will be the rare claim of ineffective
13 assistance that is tantamount to a
14 constructive denial of counsel. Strickland
 remains the norm for ineffective assistance
 claims, and the Supreme Court has made clear
 that it will not countenance a per-se
 prejudice exception which will swallow the
 actual prejudice Strickland rule.

15 Glover v. Miro, 262 F.3d 268, 276-77 (4th Cir. 2001). See also
16 Hasan v. Galaza, 254 F.3d 1150, 1154 (9th Cir. 2001); United
17 States v. Cruz-Mendoza, 147 F.3d 1069, 1072 (9th Cir. 1998).

18 Movant must overcome a strong presumption that his
19 counsel's representation was within a wide range of reasonable
20 professional assistance. See United States v. Molina, 934 F.2d
21 1440, 1447 (9th Cir. 1991). Additionally, Movant bears the
22 burden of providing sufficient evidence from which the Court can
23 conclude his counsel was ineffective. See Turner v. Calderon,
24 281 F.3d 851, 878 (9th Cir. 2002).

25 To establish that his counsel's conduct was
26 unconstitutionally substandard, a section 2255 petitioner must
27 establish that no competent counsel would have acted as his
28 counsel acted, i.e., that his counsel's acts were unreasonable.

1 United States v. Fredman, 390 F.3d 1153, 1156 (9th Cir. 2004);
2 Johnson v. Alabama, 256 F.3d 1156, 1176-77 (11th Cir. 2001).
3 Movant must overcome a strong presumption that his counsel's
4 representation was within a wide range of reasonable
5 professional assistance. See United States v. Molina, 934 F.2d
6 1440, 1447 (9th Cir. 1991).

7 Ineffective assistance of counsel claims in the context
8 of cases wherein the Movant did not go to trial are also
9 governed by the doctrine of Strickland. See, e.g., Hill v.
10 Lockhart, 474 U.S. 52, 57, 106 S. Ct. 366, 369 (1985); Fields v.
11 Attorney General, 956 F.2d 1290, 1296-97 (4th Cir. 1992). When
12 a Movant challenges a conviction or sentence resulting from a
13 plea agreement the "prejudice" prong of the Strickland test is
14 modified; the Movant must show there is a reasonable probability
15 that, but for counsel's alleged errors, he would not have pled
16 guilty to the charges against him, but instead would have
17 insisted on going to trial. See Hill, 474 U.S. at 59, 106 S.
18 Ct. at 370. Accord Fields, 956 F.2d at 1297; Craker v.
19 McCotter, 805 F.2d 538, 542 (5th Cir. 1986).

20 Section 2255 "[r]eview of counsel's performance is
21 highly deferential and there is a strong presumption that
22 counsel's conduct fell within the wide range of reasonable
23 representation." United States v. Ferreira-Alameda, 815 F.2d
24 1251, 1253 (9th Cir. 1996). With regard to the prejudice prong
25 of the Strickland analysis, the probability of prejudice may not
26 be based merely upon conjecture or speculation. See Mickens v.
27 Taylor, 122 S. Ct. 1237, 1246 (2002) (Kennedy, J. concurrence)
28 (regarding speculation as having no place in a Strickland

1 analysis).

2 In response to the answer to his section 2255 motion,
3 Movant asserts his pre-sentencing counsel was ineffective
4 because he failed to investigate a diminished capacity defense.
5 Movant contends his counsel would have discovered Movant's
6 mental incompetence had counsel examined Movant's education
7 records. Movant contends his counsel coerced him into accepting
8 a plea agreement and that counsel coached Movant regarding
9 Movant's speech and conduct at the plea colloquy. Movant also
10 contends his sentencing counsel was unconstitutionally
11 ineffective because counsel failed to move to withdraw Movant's
12 guilty plea.

13 Movant has not presented evidence that, absent his
14 counsel's alleged errors, he would have chosen to reject the
15 plea agreement and proceed to trial on charges including first-
16 degree murder, felony murder, and conspiracy to commit first-
17 degree murder. Movant accepted the plea agreement offered to
18 him immediately after his co-defendant agreed to plead guilty
19 and presumably testify against Movant. There is no evidence
20 that asserting a diminished-capacity defense would have been
21 successful or that, under any circumstances, Movant would have
22 received a sentence of less than 25 years had he chosen not to
23 accept the plea agreement and proceed to trial.

24 **III CONCLUSION**

25 The plea agreement signed by Movant waived his right to
26 bring a section 2255 action if he was sentenced in accordance
27 with the plea agreement. Because he received a sentence
28 provided for in the plea agreement, the section 2255 action may

1 be summarily dismissed. Additionally, Movant has not presented
2 any evidence that his entry of a guilty plea was unknowing or
3 involuntary, or that his counsel's advice to accept the plea
4 agreement constituted ineffective assistance of counsel.

5
6 **IT IS THEREFORE RECOMMENDED** that Mr. Henry's motion for
7 relief from his convictions and sentences pursuant to section
8 2255 be **dismissed with prejudice**.

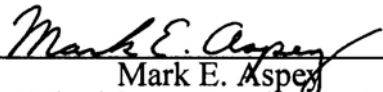
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11 This recommendation is not an order that is immediately
12 appealable to the Ninth Circuit Court of Appeals. Any notice of
13 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
14 Procedure, should not be filed until entry of the district
15 court's judgment.

16 Pursuant to Rule 72(b), Federal Rules of Civil
17 Procedure, the parties shall have fourteen (14) days from the
18 date of service of a copy of this recommendation within which to
19 file specific written objections with the Court. Thereafter,
20 the parties have fourteen (14) days within which to file a
21 response to the objections.

22 Pursuant to Rule 7.2, Local Rules of Civil Procedure
23 for the United States District Court for the District of
24 Arizona, objections to the Report and Recommendation may not
25 exceed seventeen (17) pages in length. Failure to timely file
26 objections to any factual or legal determinations of the
27 Magistrate Judge will be considered a waiver of a party's right
28 to de novo appellate consideration of the issues. See United

1 States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (en
2 banc). Failure to timely file objections to any factual or
3 legal determinations of the Magistrate Judge will constitute a
4 waiver of a party's right to appellate review of the findings of
5 fact and conclusions of law in an order or judgment entered
6 pursuant to the recommendation of the Magistrate Judge.

7 DATED this 10th day of June, 2011.

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10 Mark E. Asper
11 United States Magistrate Judge
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